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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

RODNEY AND EMILY SPENDLOVE

APPELLANTS,

V.

ANCHORAGE MUNICIPAL ZONING
BOARD OF EXAMINERS AND APPEALS,
AND UPPER DE ARMOUN AREA HOMEOWNERS
ASSOCIATION, INC.,

APPELLEES.

ON APPEAL FROM THE ALASKA SUPREME COURT

JURISDICTIONAL STATEMENT

RODNEY AND EMILY SPENDLOVE
P.O. BOX 144
ANCHORAGE, ALASKA 99510

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RODNEY AND EMILY SPENDLOVE
P.O. BOX 144
ANCHORAGE, ALASKA 99510

QUESTION PRESENTED

Does Alaska Statute 22.20.020. Disqualification of judicial officer for cause, deny substantive due process and equal protection under the Fourteenth Amendment, when recusal is refused on the following undisputed facts:

1) the trial judge acts as legal advisor and vice-chairman to an organization coordinating its activities with appellees to close Mr. Spendlove's gravel operation;

2) the judge acts as vice-chairman of and organization receiving funding from a party to this case; which party is also Mr. Spendlove's major competitor in the gravel business?

PARTIES BELOW

All of the parties appearing in the Alaska Supreme Court are listed in the caption.

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INTRODUCTORY PRARGRAPH

Appellants Rodney and Emily Spendlove, (Plaintiff below), appeals from the final order and judgment of the Alaska Supreme Court entered 5 April,1985, denying appellants' petition for rehearing, and its judgment entered 22 February,1985.

OPINIONS BELOW

The opinion of the Alaska Supreme Court which appears at appendix 24, is not reported at this time.

The final judgment of the superior court is unpublished at appendix 18.

STATEMENT OF JURISDICTION

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1257(2).

Rodney and Emily Spendlove appealed a decision of the Anchorage Zoning Board to the state superior court. The Zoning Board had limited the Spendloves gravel extraction operation to 7½ acres out of their twenty-two acre federal homestead. After a trial de novo in the superior court, the court enjoined the Spendloves from extracting any gravel. The Alaska Supreme Court affirmed.

The Spendloves had demanded the superior court judge's recusal under Alaska Statute 22.20.020. The motion was denied. The application of the statute was challenged as violating the Fourteenth Amendment.

The challenge was presented on the petition for rehearing.

This is an appeal from a final judgment of the Alaska Supreme Court entered 22 February,1985, and denial of a petition for rehearing entered 5 April,1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment

§1 ... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alaska Statute

22.20.020. Disqualification of judicial officer for cause.

(a) A judicial officer may not act as such in a court of which the judicial officer is a member in an action in which

(1) the judicial officer is a party or is directly interested;

(5) either party has retained the judicial officer as their attorney or has been professionally counseled by him in any matter within two years preceding the filing

of the action;

(6) the judicial officer feels that, for any reason, a fair an impartial deicision cannot be given.

STATEMENT OF THE CASE

The superior court trial judge was disqualified from hearing the case because: 1) he had a direct conflict of interest as vice-chairman of a non-profit organization whose program included restricting gravel operations like the Spendloves, in order to gain national recognition for Anchorage, Alaska as a model city; 2) his organization, of which he was vice-chairman, received funding from the Spendloves' major competitor; which competitor was a cross-appellant in the superior court in this case.

Mr. Spendlove demanded the judge's recusal, but was denied. [TR. 526 et sequel. R.151-155.] The following letter was placed into evidence at the recusal hearing. None of its statements were denied. (Appendix 44)

RICE, HOPPNER, HEDLAND, FLEISCHER &
INGRAHAM
1016 West 6th Avenue, Suite 400
Anchorage, Alaska 99501
(907) 279-5528

October 12, 1978

The Honorable James K. Singleton
Superior Court Judge
303 "K" Street
Anchorage, AK 99501

RE: Spendlove v. Municipality
and Gellert

Dear Judge Singleton:

.....

As Your Honor will recall, the appellant in this case is Mr. Gellert.

In the companion case, the Hillside East Community Council sought and was granted leave to intervene. The involvement of Mr. Gellert and the Hillside East Community Council came up at the hearing on the application for stay. Mr. Spendlove had taken the position in this case that Mr. Gellert was in fact acting on behalf of Anchorage Sand and Gravel, which is owned by Alaska Basic Industries, which is in turn owned to the extent of about 71% by Mr. Gellert's relatives. Mr. Spendlove's position in this case was that the opposition to the gravel pit was in fact an attempt to eliminate him as a gravel pit operation so that Anchorage Sand and Gravel could get the business from the Joint Venture doing the road project that Mr. Spendlove would have had if his gravel operations had not been stopped by the Municipality.

At all pertinent times I have been aware of the fact that you were the vice-chairman of Breakthrough and often served as its spokesman. I was not aware until after receiving the October 3, 1978 decision that Anchorage Sand and Gravel was a contributor to Breakthrough, or that Mr. Herb Lang, who I believe to be president of Anchorage Sand and Gravel and who is listed as registered agent for both Anchorage Sand and Gravel and Alaska Basic Industries, was a member of the Breakthrough Steering Committee. Other information of which I had previously been unaware came to my attention by virtue of an article that appeared in the Anchorage Times on October 6, 1978, and inquiries I have made as a result of the article. Specifically, this information

includes:

(1) Approximately two and one-half months ago the Municipality of Anchorage, acting through Mr. Mitch Gravo, an assistant to the city manager, instigated the preparation of an application to the National Municipal League to have Anchorage declared an "All-America City."

(2) The justification for the application, as set out therein, was (a) the activities of Community Councils and (b) the activities of Breakthrough. Preparation of the application was coordinated by Mr. Gravo, Your Honor providing the input relating to the Breakthrough portion, and Ms. Jean Buchanan providing the input relating to the Community Council portion. Mr. Gravo described the relationship between Your Honor, Ms. Buchanan and himself with respect to preparation of the application as a "tripartite" one, although I understand that all three persons did not meet as a group, and that in general, Mr. Gravo dealt separately with you and with Ms. Buchanan.

(3) Several drafts of the application were prepared. According to Mr. Gravo, he discussed these drafts by telephone individually with you and with Ms. Buchanan. One of the drafts specifically referred to Community Council accomplishments justifying the all-American city designation as including the action of the Hillside East Community Council in shutting down a gravel pit that its members found offensive. I do not think anyone will dispute the fact that this was the Spendlove pit.

(4) On or about September 5,

1978, the final draft of the application had been prepared. According to Mr. Gravo, it was signed only by Jean Buchanan because there was room for only one signature on the form. He said that prior to its submission, this final draft had been reviewed by you and by Ms. Buchanan. Among the activities of the Community Councils cited in this draft are "prohibiting gravel pit operations in certain areas. . . ." The application lists as active leaders three Community Council representatives and three Breakthrough representatives. One of the Community Council representatives is Mr. Gary Thurlow who is also on the Breakthrough Steering Committee and who I believe to have been instrumental in the creation of Breakthrough. A second is Ms. Toni Jones, whom I believe to be employed in Mr. Thurlow's office. Both are apparently active on the Board of the Federation of Community Councils and I do not intend to suggest any impropriety whatsoever on the part of either Mr. Thurlow or Ms. Jones.

Thus, it appears that the Municipality, the Community Councils, and Breakthrough had a joint interest in supporting and furthering the "All-American City" application. It further appears that there was cooperaton and some overlap in personnel between Breakthrough and the Community Councils. It is clear that the Hillside East Community Council was active in the opposition to the Spendlove Gravel Pit, and that Anchorage Sand and Gravel was allegedly interested financially in the outcome of the decision in a manner adverse to the interest of Mr. Spendlove. It also appears that the

joint action of the Municipality, Breakthrough, and the Community Councils in obtaining all-American city recognition was based in part upon the asserted success in shutting down Mr. Spendlove's pit. Selection of Anchorage as a finalist for all-American city recognition occurred on or about September 26, but was subject to a "no release" until October 6, 1978.

Under the above circumstances, I have no alternative but to conclude that, given Your Honor's association with Mr. Lang with respect to Breakthrough, Anchorage Sand and Gravel's contribution to Breakthrough, the alleged interest of Anchorage Sand and Gravel in the outcome of the Spendlove case adverse to the interest of Mr. Spendlove, the asserted interest of the Hillside East Community Council in the outcome of the case adverse to the interest of Mr. Spendlove, and Your Honor's participation in the joint efforts of the Community Councils, Breakthrough, and the Muncipality in obtaining All-American City recognition for Anchorage based in part upon shutting down or prohibiting gravel pits, there resulted a situation in which Your Honor's handling of the litigation involving the Spendlove gravel pit raised questions of potential relationships, or the appearance thereof, that would be within the purview of A.S. 22.20.020 and similar promulgations and should therefore have been disclosed to counsel involved in the case. No such disclosure was made.

I must therefore suggest that Your Honor should not participate in any further proceedings in this matter.

Additionally, since the decision of October 3, 1978, postdated the situation discussed above, it appears that this decision should be subject to reconsideration on the merits of another judge. Procedurally I am not sure what the next appropriate step is, and I have no desire to cause embarrassment to any person. It is my hope that this letter, with copies to opposing counsel will result in a just resolution of the situation.

Sincerely,

/s/
John S. Hedland

JSH/rl

cc: Robert Mintz, Esq.
Allen Tesche, Esq.

THE FEDERAL QUESTION IS SUBSTANTIAL

I. The application of AS 22.20.020 violates the right to an impartial, disinterested judge protected under the Fourteenth Amendment guarantees to due process and equal protection.

The question is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonable question his impartiality on the basis of all the circumstances. The provision for disqualification is not a court-made rule. It is a substantive right granted by the legislature under AS 22.20.020.

The totality of the facts as shown require recusal. The reasonable question is raised in the mind of the public who

must believe in the total integrity and impartiality of their judges. The appearance of partiality does not reassure a public already skeptical of judges, lawyers, and the legal system.

There is a maxim of law regarding judicial action that has Constitutional bearing on the validity of the judgment in this case:

NO MAN OUGHT TO BE A JUDGE IN HIS OWN CAUSE.

This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has <u>no jurisdiction</u> to determine the cause.

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge...not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Tumey v. Ohio, 273 U.S. 510,532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." Offutt v. U.S., 348 U.S. 11,14.

In re Murchison, 349 U.S. 133,136(1955).

The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative

proceedings safeguards the two central concerns of procedural due process:

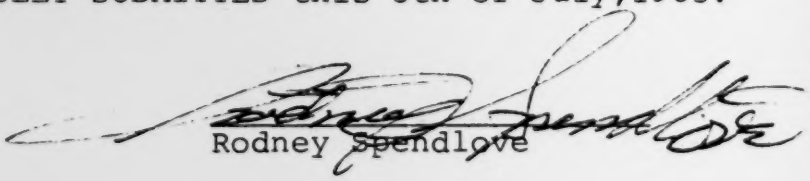
1) the prevention of unjustified or mistaken deprivations;

2) the promotion of participation and dialogue by affected individuals in the decisionmaking process. Carey v. Piphus, 435 U.S. 247,259-262,266-267(1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distroted conception of the facts or the law. Mathews v. Eldridge, 424 U.S. 319,344(1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123,172(1951)(Frankfurter, J., concurring). In this way the Constitution ensures

that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the judge is not predisposed to find against him.

CONCLUSION: The application of AS 22.20.020 to deny recusal of a judge whose interest and financial conflicts cannot be reasonably questioned, denies Due Process and Equal Protection under the Fourteenth Amendment. The United States Supreme Court should take jurisdiction of this appeal on the federal question presented.

RESPECTFULLY SUBMITTED this 5th of July, 1985.



Rodney Spendlove

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IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

RODNEY and EMILY SPENDLOVE,)
)
Appellants,)
)
vs.)
ANCHORAGE MUNICIPAL ZONING)
BOARD OF EXAMINERS AND)
APPEALS, et al.,)
)
Appellees,)
)

No. 3AN-78-3303 CIV

FINAL JUDGMENT

The Court having entered its Findings of Fact and Conclusions of Law:

HEREBY ORDERS, ADJUDGES, DECLARES AND DECREES THAT:

1. A mineral or natural resource extraction use operation on property of Appellants Spendlove in Government Lot 2 of Section 30, Township 12 North, Range 2 West, Seward Meridian, Alaska did not exist as of April 24, 1969; nor did the activity on the land which would be

necessary for the continued existence of such a use occur on that property in any year prior to 1975; if then.

2. Appellants Spendlove are enjoined from, and shall neither conduct nor permit others to conduct, mineral or natural resource extraction operations on Government Lot 2, Section 30, Township 12 North, Range 2 West, Seward Meridian, Alaska; except in conformity with such lawful special exception or conditional use as they may hereafter obtain, if any, from the proper authorities under existing law; further except as such extraction or operations may become lawful, if ever, through a rezoning or change in the legislation respecting land use in the area.

3. Appellants Spendlove shall prepare, after consultation with the Upper DeArmoun Area Homeowners Association, Inc., and with the prior

approval of the Department of Public Works of the Municipality of Anchorage, a suitable plan for abatement of the hazards presently existing on the Spendlove property resulting from placement of certain overburden in the area south and west of the public road within Government Lot 2, and for restoration and revegetation of that property to a safe and stable condition in conformity with approved zoning, environmental, and fire and life safety ordinances and regulations of the Municipality of Anchorage. Upon approval of that plan by the Municipal Public Works Department, the Spendloves shall execute that plan forthwith.

4. A public right-of-way for a road exists through Government Lot 2 and between the two Spendlove View Heights Addition No. 2. This right-of-way is centered upon the centerline of the

roads and track which existed in the period 1969-1976, and is for roads meeting standard municipal mountain road specifications. Appellants and Appellees may further refine and redefine the location of this road in the course of abatement through restoration.

5. The appeal of the Spendloves from the decision of the Anchorage Zoning Board or Examiners and Appeals is dismissed with prejudice.

6. This Court retains jurisdiction over the parties for purposes of enforcing this Judgment. Should the abatement matter not proceed amicably to a fully executed solution, any party may by motion seek relief consistent with this Judgment, including also, for example, an order permitting one or both Appellees to go upon the property to do the work, and to assess

the costs back against the property, and to seek a deficiency, if any.

7. Appellee Upper DeArmoun Area Homeowners Association, Inc. has judgment against Rodney Spendlove and Emily Spendlove jointly and severally, in the amount of $409.00 for costs in this action and $5,000.00 for attorney's fees, for a total judgment of $5,409.00; this Judgement to bear interest at the rate of eight percent (8%) per annum from the date hereof.

8. Appellee Municipality of Anchorage has judgment against Rodney Spendlove and Emily Spendlove, jointly and severally, in the amount of $7,684.40 for costs of this action and $5,000.00 for attorney's fees, for a total judgment of $12,684.40; this Judgment to bear interest at the rate of eight percent (8%) per annum from the date hereof.

DATED this 23 day of July, 1980, at Anchorage, Alaska.

Superior Court Judge

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT OF

THE STATE OF ALASKA

RODNEY SPENDLOVE and EMILY SPENDLOVE,	)
Appellants,	)
v.	)
ANCHORAGE MUNICIPAL ZONING BOARD OF EXAMINERS & APPEALS and UPPER DeARMOUN AREA HOMEOWNERS ASSOCIATION, INC.,	)
Appellees.	)

File No. 5663

O P I N I O N

ANCHORAGE MUNICIPAL ZONING BOARD OF EXAMINERS AND APPEALS and UPPER DeARMOUN AREA HOMEOWNERS ASSOCIATION, INC.,

Cross-Appellants,

v.

RODNEY SPENDLOVE and EMILY SPENDLOVE,

Cross-Appellees.

File No. 5680
[No. 2914 - February 22, 1985]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, James K. Singleton, Judge.

Appearances: Steven P. Oliver, Anchorage, for Appllants and Cross-Appelles. Allan E. Tesche, Assistant Municipal Attorney, Anchorage, Jerry Wertzbaugher, Municipal Attorney, Anchorage, for Appellee and Cross-Appellant Anchorage Municipal Zoning Board of Examiners & Appeals. Edward G. Burton, Burr, Pease & Kurtz, Inc., Anchorage, for Appellee and Cross-Appellant Upper DeArmoun Area Homeowners Association, Inc.

Before: Rabinowitz, Chief Justice, Matthews, Compton, and Moore, Justice. [Burke, Justice, not participating.]

PER CURIAM

This is an appeal from a decision of the Anchorage Municipal Zoning Board denying Rodney and Emily Spendlove (hereinafter "Spendlove") the use of twenty-two and one-half acres for mineral resource extraction. Following a lengthy trial de novo granted at Spendlove's request, the court entered judgment against Spendlove, enjoining mineral or natural resource extraction and dismissing Spendlove's appeal from the decision of the Zoning Board. Spendlove appeals, and the appellees, the Municipality and the DeArmoun Homeowners' Association, cross-appeal for attorney's fees. We affirm.

Prior to April 1969, the Spendlove property was regulated by an interim zoning ordinance of the Greater Anchorage Area Borough that did not categorically prohibit commercial mineral resource extraction

operations. Effective in 1969, through the enactment of a new borough zoning ordinance known as GAAB I-69, the Spendlove property was zoned "U" or unrestricted, a zoning classification that permitted commercial mineral resource extraction only if the use lawfully pre-dated the zoning as a valid non-conforming use or was allowed by special exception. In 1977, the Anchorage Assembly enacted Anchorage Municipal Code 21.55.090 requiring operators of non-conforming gravel pits such as Spendlove's to apply for and receive approval of amortization permits and development and restoration plans. Amortization permits are available only where the exploitation of mineral resourced exists as a non-conforming use and has been in continuous existence since April 21, 1969. Both the Zoning Board and the trial court concluded that

Spendlove had not established a non-conforming use for mineral resource extraction prior to April 1969.

In reaching this conclusion, the trial court held that only those mineral resource extractions that existed as commercial or industrial uses within the meaning of AMC 21.35.020 (B) (59) constitute a use to which the law regarding non-conformities apply.

AMC 21.35.010 (B) (59) provides:

> 'Mineral resources operations' or 'natural resources extractions' ('mineral or natural resources development') means commercial or industrial operations involving removal of . . . gravel, rock, or any mineral and other operations having similar characteristics.[1]

(Emphasis added) Because Spendlove was enjoined from "mineral or

---

1. See also GAAB 21.05.020 (B) (45), the predecessor to AMC 21.35.020 (B) (59).

natural resource extraction operations" it was appropriate for the trial court to determine whether Spendlove had established a commercial use prior to 1969.

The trial court also adopted a "substantial use" test for the level of commercial activity necessary to "rise to the level of a mineral resource extraction." The substantial use test is consistent with zoning policy and favored by commentators:

> Where the loss to the owner arising out of the curtailment of his prior use of the property is insubstantial, the loss is deemed balanced by the resulting effectiveness of the zoning ordinance on the implementation of the comprehensive plan of development of the community and the consequent benefits conferred thereby on all property owners therein.

4 A. Rathkopf, The Law of Zoning and Planning § 51.03, at 51-27 (4th ed. 1984).[2] Substantial evidence exists on

the record to support the court's finding that Spendlove's activities prior to 1969 were sporadic and insubstantial. The superior court properly enjoined Spendlove from mineral or natural resource extraction.

---

2. See 4 N. Williams, American Land Planning § 110.03, at 405-406 (1975); see, e.g., Paukovits v. Zoning Board of Appeals, 412 N.Y.S. 2d 167 (N.Y. App. Div. 1979); Blundell v. City of W. Helena, 522 S.W.2d 661, 666 (Ark. 1975); Ashley v. City of Bedford, 312 N.E.2d 863, 866 (Ill. App. 1974); Town of Lloyd v. Kart Wheelers Raceway, Inc., 283 N.Y.S.2d 756, 757 (N.Y. App. Div. 1967).

Williams provides an extensive list of citations to cases that have "dismissed token and casual operations as insufficient." 4 N. Williams at 409.

As to the appellees' cross-appeal for attorney's fees, we find that the award of $10,000.00 is reasonable and AFFIRM.

Pursuant to Appellate Rule 508 (f) (1), the appellee shall serve

and file with this court by 3/4/85 an itemized and verified bill of costs.

IN THE SUPREME COURT FOR

THE STATE OF ALASKA

RODNEY SPENDLOVE AND EMILY SPENDLOVE,

Appellants,

vs.

ANCHORAGE MUNICIPAL ZONING BOARD OF EXAMINERS & APPEALS AND UPPER DeARMOUN AREA HOMEOWNERS ASSN.,

Appellees.

FILE No. 5663 & 5680

No. 2914 - February 22, 1985

PETITION FOR REHEARING

I. AS 22.20.020 AND ALASKA JUDICIAL CANNONS 2 AND 3 (C) VIOLATE THE U.S. CONSTITUTION BY THEIR APPLICATION TO DEPRIVE MR. SPENDLOVE OF AN IMPARTIAL TRIBUNAL

The evidence is undisputed that the trier of fact in this equitable proceeding had a direct interest in the controversy to close Mr. Spendlove's gravel pit. Judge Singleton was vice-chairman of Breakthrough, an organization coordinating its activities

with Mr. Spendlove's two protagonists, the Municipality and the Hillside East Community Council.

Judge Singleton made no disclosure of his relationship until forced to do so by Mr. Spendlove's attorney. (Exhibit A)

The Judge went so far as to exclude evidence that would show the financial relationship between: 1) Judge Singleton; 2) Breakthrough; 3) Alaska Sand and Gravel-a financial contributor to Breakthrough and main competitor of Mr. Spendlove; 4) Mr. Gellert, appellant in this case and majority owner along with his relatives of Alaska Sand and Gravel.

AS 22.20.020 and Judicial Cannons 2 and 3(C) deprive Mr. Spendlove of Due Process and Equal Protection by their application in this action.

II. MUNICIPAL CODE 21.55.090 VIOLATES THE PROVISIONS OF THE U.S. CONSTITUTION UNDER: 1) ART. 1 §10; 2) THE FOURTEENTH AMENDMENT: ITS APPLICATION TO SPENDLOVE IMPAIRS THE RIGHT TO CONTRACT AND DENIES DUE PROCESS AND EQUAL PROTECTION

The state courts apply 21.55.090 to deprive and impair Mr. Spendlove's right to contract in commerce and deny Due Process and Equal Protection by deciding absolutely contrary to the judicial admissions of record.

The Findings of Fact, (Exhibit B), and the findings of fact from the bench, (Exhibit C), determined that there was a commercial business transacted by Mr. Spendlove prior to 1969 to the time of shutdown. The courts Constitutionally err by deciding contrary to the facts. The validity of the application of any law depends upon the truth of the facts declared. Chaslteton Corp. v. Sinclair, 264 U.S.

543,547(1924; U.S. v. Carolene Products, 304 U.S. 144, 153-154(1938).

FACTS

"I'm not prepared to say-- and I don't think anyone has arg'ed, that no gravel was taken from the premises in the period prior to 1969 or for the period '69 to 75.' (Exhibit C-11)

"From '69 to 73' there is no question that Mr. Spendlove from time to time made sales." (Exhibit C-3)

"On his federal income tax return he listed himself as a excavating contractor." (Exhibit B-7)

"Prior to April 24, 1969 extraction of material from the Spendlove property was from locations other than the extraction site used by the Mat-Su/Stephan Venture in early 1978." (Exhibit B-5)

"In December 1977, Mr. Spendlove entered into a contract with Mat-Su/Stephan Joint Venture to provide in excess of 350,000 tons of material from his property." (Ex. B-9)

20,000 yards of material had been removed from the Spendlove extraction site before Feb. 1978. (Exhibit B-10)

"[i]t was his intent to remove an

> additional 350,000 to 400,000 tons and sell that material to the public." (Ex. B10)

Mr. Spendlove has a federal homestead patent. A federal land patent conveys perfect title to the national government's rights in land. Wright v. Roseberry, 121 U.S. 488; Wilcow v. Jackson, 13 Pet. 511. Those rights are to possess, use, enjoy, and dispose of by alienation. Soulard v. U.S., 4 Pet 511.

It is a judicial fact that prior to 1969 until date of shutdown, Mr. Spendlove used gravel from his land in his business as a commercial real estate developer and excavation contractor, and for sales to the public at large. All of his business activity was accounted for on his return of income forms as a venture for profit under the codified Law Merchant, the Internal Revenue Code.

A sales is a transferring of

property from one person to another, in consideration of a sum of money; or an exchange of one parcel of good for another; or one estate in land is granted in consideration of another.

Mr. Spendlove derived his livelihood directly from his federal patent by contracting under Art. 1 §10 for the alienation of his property rights by sale in the market overt.

The state courts deny Mr. Spendlove his right to contract for his property because they are of the "opinion" that under 21.55.090, "commercial" means something more than what Spendlove was engaged in. Commerce is a generic term of fact, not a quantitive word. Commerce embraces every phase of commercial or business activity. Gibbons V. Ogden, 9 Wheat 1, 190, 191, 215, 229. Commercial means sales in the market overt for profit.

15A C.J.S. Commercial. Mining brings the subject matter of commerce into existence; commerce disposes of it. Carter v. Carter Coal Co., 298 U.S. 238, 304.

Judicial Notice is requested of the Alaska economic facts argued in Hicklin v. Orbeck, 437 U.S. 518 (1978). Alaska's economy prior to the TAPS line was seasonal and determined by government expenditures. Mr. Spendlove is taken out of a generic class of commercial businessmen and deprived of property by a non-existent classification standard. Under HJR 192 before this Court in the Gold Bondholders case, it is the National policy that the dollar will fluctuate as a commodity causing economic cycles. If that is the law, how can Mr. Spendlove be deprived of property because he is subject to the law that determines his

economic activity. That classification is a violation of the Equal Protection and Due Process Standard of the Constitution.

CONCLUSION: Mr. Spendlove was deprived of the right to contract and the right to have that contract unimpaired by municipal ordinance. Judge Singleton is the perfect example of the temptation that is to be averted by removal of a partial adjudicator. He did everything in his utmost to misinterpret the evidence. The evidence was just to overwhelming for even him to find totally against.

Mr. Spendlove has been deprived of Constitutional protections by a non-existent standard capriciously applied in violation of Equal Protection and Due Process.

RESPECTFULLY SUBMITTED this 29th day of March, 1985.

Rodney Spendlove
P.O. Box 144
Anchorage, Alaska 99510

THE SUPREME COURT OF

THE STATE OF ALASKA

RODNEY SPENDLOVE, et al.,	)
	)
Appellants and Cross-Appellees	)
	)
vs.	)
	)
ANCHORAGE MUNICIPAL ZONING BOARD OF EXAMINERS & APPEALS, et al.,	)
	)
Appellees and Cross-Appellants.	)
	)

Superior Court No. 3An 78-3303 Civil

Before: Rabinowitz, Chief Justice Matthews, Compton and Moore, Justices. [Burke, Justice, not participating.]

On consideration of the petition for rehearing, filed on March 29, 1985,

IT IS ORDERED:

The petition for rehearing is denied.

Entered by direction of the court

at Anchorage, Alaska on April 5, 1985.

CLERK OF THE SUPREME COURT

DAVID A. LAMPEN

ccs: Justices
Counsel
Mr. Rodney Spendlove
Appeals Deputy Clerk, Anchorage
Trial Courts

IN THE SUPREME COURT OF THE

STATE OF ALASKA

RODNEY AND EMILY SPENDLOVE,

APPELLANTS,

VS.

ANCHORAGE MUNICIPAL ZONING
BOARD OF EXAMINERS & APPEALS
and UPPER DeARMOUN AREA
HOMEOWNERS ASSOCIATION,INC.,

APPELLEES.

FILE NO. 5663

NOTICE OF APPEAL TO THE

SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Rodney and Emily Spendlove, appellants, hereby appeal to the Supreme Court of the United States from the final judgment of April 5,1985, denying the Petition for Rehearing.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Rodney Spendlove

1 July, 1985.

RICE, HOPPNER, HEDLAND, FLEISCHER & INGRAHAM
1016 West 6th Avenue, Suite 400
Anchorage, Alaska 99501
(907) 279-5528

October 12, 1978

The Honorable James K. Singleton
Superior Court Judge
303 "K" Street
Anchorage, AK 99501

RE: Spendlove v. Municipality and Gellert

Dear Judge Singleton:

After a great deal of consideration, I have concluded that, however reluctant I am to do so, my oath and responsibility to my client require taht I write this letter. It is my intention to present it to you in chambers with copies to opposing counsel.

Oral argument on appellant's motion for a stay was held before Your Honor on August 10, 1978. At that hearing, the Court indicated very strongly that it was going to construe subsection G in accordance with appellant's position, i.e., that it provided for an automatic special exception, and not follow the Alagco decision. Given that likelihood, it became relevant whether the alleged "gap" in Mr. Spendlove's uses of the pit preceded or took place after a certain date in 1974. The Court

indicated that it would remand the case to the Zoning Board of Examiners and Appeals for a determination of this factual question, simultaneously with expediting briefing of the legal issues in the case. Specifically, the briefing was going to go to other arguments the Municipality intended to raise, apart from subsection G, that would support denial of Mr. Spendlove's right to operate the gravel pit. Because all parties recognized that the construction season was waning away, the Municipality and Mr. Mintz were allowed until August 18 to submit a brief, and I was allowed until August 23 to reply. The Court stated that it would rule on the matter on August 23, or shortly thereafter. The Court also denied the application for stay. The supplemental briefing was to go to a decision on the merits which, if the Court adhered to the position it was tentatively taking on August 10, would moot the balance of the issues on appeal.

On August 11, following a one-day period during which the parties were to attempt to resolve by stipulation the factual question (i.e., when the gap occurred), and upon the parties' inability to stipulate to this question and the Court's ruling that it would not look to the record of the hearing itself in an attempt to resolve it, and it having become apparent that the Board which originally ruled no longer existed such that a remand was possible, the Court stated that if the decision on the legal question was in Mr. Spendlove's favor, no remand would be ordered.

The Municipality and Mr. Mintz filed their briefs on August 18. Mr.

Spendlove's reply was filed before the due date in an attempt to expedite matters. By August 25, there had been no decision. I contacted your secretary to determine whether or not one would be forthcoming before the weekend. Approximately one to two weeks later I again contacted your secretary in an attempt to learn the status of the case and the call was again unproductive. Following several other calls to your secretary or law clerk, I gained the impression about the middle of September that the matter was being considered at that time but had not as yet been ruled upon. On or about September 28, I learned that a decision had been dictated but not signed, and that Your Honor was in Dillingham. I requested of your secretary that you be contacted in an attempt to obtain authorization to release the decision. I informed her that we wer concerned that the construction season would be over before a decision was forthcoming, and that, if the decision was favorable, we wished to commence gravel removal and if it was unfavorable, we wanted to be in a position to seek appellate review in time for it to be meaningful. No decision was forthcoming until the afternoon of Tuesday, October 3, 1978. In that decision, the Court denied the stay and stated that no remand would be ordered, both of which questions had already been resolved, and indicated that it would adhere to the Alagco decision notwithstanding the administrative interpretation of the ordinance in question.

As Your Honor will recall, the appellant in this case is Mr. Gellert.

In the companion case, the Hillside East Community Council sought and was granted leave to intervene. The involvement of Mr. Gellert and the Hillside East Community Council came up at the hearing on the application for stay. Mr. Spendlove had taken the position in this case that Mr. Gellert was in fact acting on behalf of Anchorage Sand and Gravel, which is owned by Alaska Basic Industries, which is in turn owned to the extent of about 71% by Mr. Gellert's relatives. Mr. Spendlove's position in this case was that the opposition to the gravel pit was in fact an attempt to eliminate him as a gravel pit operation so that Anchorage Sand and Gravel could get the business from the Joint Venture doing the road project that Mr. Spendlove would have had if his gravel operations had not been stopped by the Municipality.

At all pertinent times I have been aware of the fact that you were the vice-chairman of Breakthrough and often served as its spokesman. I was not aware until after receiving the October 3, 1978 decision that Anchorage Sand and Gravel was a contributor to Breakthrough, or that Mr. Herb Lang, who I believe to be president of Anchorage Sand and Gravel and who is listed as registered agent for both Anchorage Sand and Gravel and Alaska Basic Industries, was a member of the Breakthrough Steering Committee. Other information of which I had previously been unaware came to my attention by virtue of an article that appeared in the Anchorage Times on October 6, 1978, and inquiries I have made as a result of the article. Specifically, this information

includes:

(1) Approximately two and one-half months ago the Municipality of Anchorage, acting through Mr. Mitch Gravo, an assistant to the city manager, instigated the preparation of an application to the National Municipal League to have Anchorage declared an "All-America City."

(2) The justification for the application, as set out therein, was (a) the activities of Community Councils and (b) the activities of Breakthrough. Preparation of the application was coordinated by Mr. Gravo, Your Honor providing the input relating to the Breakthrough portion, and Ms. Jean Buchanan providing the input relating to the Community Council portion. Mr. Gravo described the relationship between Your Honor, Ms. Buchanan and himself with respect to preparation of the application as a "tripartite" one, although I understand that all three persons did not meet as a group, and that in general, Mr. Gravo dealt separately with you and with Ms. Buchanan.

(3) Several drafts of the application were prepared. According to Mr. Gravo, he discussed these drafts by telephone individually with you and with Ms. Buchanan. One of the drafts specifically referred to Community Council accomplishments justifying the all-American city designation as including the action of the Hillside East Community Council in shutting down a gravel pit that its members found offensive. I do not think anyone will dispute the fact that this was the Spendlove pit.

(4) On or about September 5,

1978, the final draft of the application had been prepared. According to Mr. Gravo, it was signed only by Jean Buchanan because there was room for only one signature on the form. He said that prior to its submission, this final draft had been reviewed by you and by Ms. Buchanan. Among the activities of the Community Councils cited in this draft are "prohibiting gravel pit operations in certain areas. . . ." The application lists as active leaders three Community Council representatives and three Breakthrough representatives. One of the Community Council representatives is Mr. Gary Thurlow who is also on the Breakthrough Steering Committee and who I believe to have been instrumental in the creation of Breakthrough. A second is Ms. Toni Jones, whom I believe to be employed in Mr. Thurlow's office. Both are apparently active on the Board of the Federation of Community Councils and I do not intend to suggest any impropriety whatsoever on the part of either Mr. Thurlow or Ms. Jones.

Thus, it appears that the Municipality, the Community Councils, and Breakthrough had a joint interest in supporting and furthering the "All-American City" application. It further appears that there was cooperaton and some overlap in personnel between Breakthrough and the Community Councils. It is clear that the Hillside East Community Council was active in the opposition to the Spendlove Gravel Pit, and that Anchorage Sand and Gravel was allegedly interested financially in the outcome of the decision in a manner adverse to the interest of Mr. Spendlove. It also appears that the

joint action of the Municipality, Breakthrough, and the Community Councils in obtaining all-American city recognition was based in part upon the asserted success in shutting down Mr. Spendlove's pit. Selection of Anchorage as a finalist for all-American city recognition occurred on or about September 26, but was subject to a "no release" until October 6, 1978.

Under the above circumstances, I have no alternative but to conclude that, given Your Honor's association with Mr. Lang with respect to Breakthrough, Anchorage Sand and Gravel's contribution to Breakthrough, the alleged interest of Anchorage Sand and Gravel in the outcome of the Spendlove case adverse to the interest of Mr. Spendlove, the asserted interest of the Hillside East Community Council in the outcome of the case adverse to the interest of Mr. Spendlove, and Your Honor's participation in the joint efforts of the Community Councils, Breakthrough, and the Muncipality in obtaining All-American City recognition for Anchorage based in part upon shutting down or prohibiting gravel pits, there resulted a situation in which Your Honor's handling of the litigation involving the Spendlove gravel pit raised questions of potential relationships, or the appearance thereof, that would be within the purview of A.S. 22.20.020 and similar promulgations and should therefore have been disclosed to counsel involved in the case. No such disclosure was made.

I must therefore suggest that Your Honor should not participate in any further proceedings in this matter.

Additionally, since the decision of October 3, 1978, postdated the situation discussed above, it appears that this decision should be subject to reconsideration on the merits of another judge. Procedurally I am not sure what the next appropriate step is, and I have no desire to cause embarrassment to any person. It is my hope that this letter, with copies to opposing counsel will result in a just resolution of the situation.

Sincerely,

/s/
John S. Hedland

JSH/rl

cc: Robert Mintz, Esq.
Allen Tesche, Esq.